as soon as the promissory note was signed. In the circumstances, in my opinion, the two documents can be read together to constitute a good memorandum.

The burden of proving that an authenticated copy of the memorandum was handed to the borrower is upon the moneylender but where there is written acknowledgment by the lender that an authenticated copy of the memorandum was delivered to him, the onus is upon him to show either that no copy was delivered to him or that the copy delivered was not authenticated. The borrower has neither produced the copy delivered to him nor has he given any evidence and the presumption therefore is that an authenticated copy of the memorandum was delivered to him. If the copy of the memorandum was duly authenticated, the fact that the copy of the promissory note delivered was not authenticated is not material because the two documents can be treated as a sufficient memorandum. In the result I hold that the provisions of section 16 of the Ordinance have been complied with and that the plaintiff is entitled to succeed on this claim. Therefore there will be judgment for the plaintiff for $13,915 with interest on $11,500 at 12 per cent per annum from the date of filing of this action to date and thereafter on the amount of such judgment debt at the rate of 6 per cent per annum to the date of realization and costs.

Claim allowed.

Solicitors: *K. Rajanayagam*; *Rajendra & Teik Ee.*

WONG SWEE CHEW v. HOW MOU LEE

[O.C.J. (Gill J.) April 3, 1964]

[K.L. — Civil Suit No. 609 of 1963]

Partnership — Termination of — Judgment entered by 3rd party against partnership — Satisfaction of judgment debt by one partner — Claim by partner satisfying judgment debt against other partner for contribution — Partnership account.

Practice and Procedure — Application to sign final judgment — Defence filed — Order to consolidate present action with another action — Stay of proceedings pending taking of partnership accounts — Application under O. 54 r. 22A for further arguments.

The plaintiff and the defendant were partners in equal shares in a firm known as "Lee & Wong" which was terminated on March 31, 1956. One CKY, the wife of the defendant, obtained judgment against the firm in Civil Suit No. 448 of 1960 and the appeal including interest and costs for the sum of $45,167.90. This amount was paid by the plaintiff in full satisfaction thereof on July 30, 1963. The plaintiff now commenced this action in order to recover from the defendant $22,583.95 by way of contribution in respect of the partnership debt. On September 11, 1963 the plaintiff's solicitors took out a summons for leave to sign final judgment in the action on the ground that the defendant had no defence whatsoever to the action. The defendant filed his statement of defence on October 15, 1963 and on the same day took out a summons for an order that the present action be consolidated with the action in Suit No. 172 of 1963 between the same parties and for a further order that the proceedings in the consolidated action be stayed pending the preparation of the final accounts of the partnership. On October 21, 1963 the learned judge dismissed the application for leave to sign final judgment and made an order for consolidation of the two actions and a stay of proceedings in the consolidated action pending the preparation of the final accounts. The plaintiff then applied under Order 54 r. 22A of the Rules of the Supreme Court, 1957 for the hearing of further arguments.

At the hearing plaintiff's counsel argued that (a) there was a clear admission of liability by the defendant in his statement of defence (b) a counterclaim was no bar to a judgment on the claim unless it arose out of the claim and was so connected with its subject matter that it was in the nature of a defence and (c) in the circumstances of this case the court should exercise its inherent jurisdiction and make the order sought.

Held: (1) there was no admission of liability in respect of the whole of the claim;

(2) although the arguments of counsel as general statements of the law were perfectly accurate these statements of the law did not strictly apply in relation to partnership transactions. As the claim and the counterclaim were in relation to the partnership business it would be unjust to grant the application of the plaintiff to sign final judgment;

(3) in the absence of any proof that the counterclaim which the defendant had set up by way of a set off was frivolous and unsubstantial, it would be wrong for the court to grant the plaintiff any relief in the guise of the inherent jurisdiction of the court to the detriment of the defendant.

Case referred to:—

Sedgwick v. *Daniell* (1857) 2 H. & N. 319; 157 E.R. 132.

ACTION.

M. Shankar for the plaintiff.

L. E. Osman for the defendant.

Cur. Adv. Vult.

Gill J.: The parties to this action were partners in equal shares of a firm known as "Lee & Wong" which is said to have been terminated on the 31st March, 1956. In Civil Suit No. 448 of 1960 of this court one Chan King Yue, who is the wife of the defendant in the present action, obtained judgment against the firm for $35,000 together with interest and costs. The claim in that civil suit was based on a loan made by Chan King Yue to the firm on 26th November, 1955 in respect of which loan the firm had given her a receipt for the amount as evidence of the loan. The present defendant in his capacity as a partner of the firm did not contest the claim in that civil suit, but the present plaintiff did. The plaintiff also proceeded to appeal against the judgment in that civil suit but withdrew his appeal at the last moment. On the appeal being dismissed an order was made for the payment of costs of the appeal by the firm. The total amount against the firm in respect of the decretal

amount together with interest and costs of the suit as well as of the appeal amounted to $45,167.90. This amount was paid by the present plaintiff in full satisfaction of the amount due in Civil Suit No. 448 of 1960 on 30th July, 1963.

This action was initiated by the plaintiff on 23rd August, 1963 in order to recover from the defendant a sum of $22,583.95 by way of contribution in respect of the partnership debt for which judgment was obtained in Civil Suit No. 448 of 1960 and which judgment was satisfied by the plaintiff alone. The defendant entered an appearance on the action on 9th September, 1963. On 11th September, 1963 the plaintiff's solicitors took out a summons for leave to sign final judgment in the action, on the ground that the defendant has no defence whatsoever to the action. The defendant filed his statement of defence on 15th October, 1963. On the same day the defendant took out a summons for an order that this action be consolidated with the action in Civil Suit No. 172 of 1963 between the same parties and for a further order that the proceedings in the consolidated action be stayed, pending the preparation of the final accounts of the partnership firm of Lee & Wong. Both these applications came up before me for hearing on the 21st October, 1963. The view which I took on these two applications was that the plaintiff was not entitled to recover any judgment against the defendant until the accounts of their partnership were finalized and until it was ascertained upon proper enquiry or otherwise as to what was due to or from each of the partners. I therefore dismissed the application for leave to sign final judgment and made an order for consolidation of the two actions and a stay of proceedings in the consolidated action, pending the preparation of the final accounts.

The plaintiff then made an application under Order 54, rule 22A of the Rules of the Supreme Court, 1957 for the hearing of further arguments on the matter.

At the hearing of further arguments in court, the first argument put forward by Mr. Shankar on behalf of the plaintiff was that there was a clear admission of liability by the defendant in his statement of defence. With very great respect, I can find no such admission in respect of the whole of the claim. The defendant has stated in his defence that he is not liable to contribute in respect of a sum of $10,167.90 which was incurred by way of costs because of the plaintiff's wrongful conduct in challenging the rightful claim of Chan King Yue in Civil Suit No. 448 of 1960. As regards the rest of the claim the defendant has stated by way of set off and counterclaim that the plaintiff himself utilized large quantities of partnership property and incurred substantial debts in the name of the partnership for his own benefit and on account of his own business.

The second argument put forward by Mr. Shankar was that a counterclaim is no bar to a judgment on the claim unless it arises out of the claim and is so connected with its subject matter that it is in the nature of a defence. He also argued that a counterclaim must not arise out of a different contract. These arguments as general statements of the law as to counterclaims are of course perfectly accurate. However, the present action arises out of the affairs of a partnership, and in my opinion these general statements of the law do not strictly apply in relation to partnership transactions. The law as regards partnership transactions is stated by *Halsbury* (3rd Edn.) vol. 8, para 405 at page 234 as follows:—

> "Where partners are under a joint liability in respect of a particular transaction arising out of and connected with the partnership, and one of them is compelled to pay more than his share of such joint liability, the court will not enforce his right of contribution in respect thereof against his co-partners, except in an action for a general partnership account."

The case cited as an authority for the above proposition of law is the case of *Sedgwick* v. *Daniel.*(1) It was also decided in the same case that the above rule has no application where two or more persons engage in a particular transaction which is distinct and separate from their partnership business; in such case the right of contribution will be enforced. If I understood Mr. Shankar correctly, this second rule enunciated in the above case was the sheet anchor of his argument, his contention being that the facts in the present case are indistinguishable from the facts of that case. That was a case in which three shareholders agreed to become security for money advanced to the company. It was decided that that must be considered as a transaction separate and apart from the partnership. Martin B. said in that case:—

> "If three partners agree that each shall bring into the concern 500 pounds, that becomes a part of the partnership property; and no action can be maintained in respect of the money brought in by each; for it would be useless for one partner to recover, when, upon taking a general account amongst all the partners, he might be liable to refund."

In my opinion the position in this case is no different. The money obtained from the plaintiff in Civil Suit No. 448 of 1960 was utilized by the partnership, so that it cannot be said that this particular transaction was distinct and separate from the partnership business. Both the claim and the counterclaim are in relation to the partnership business. Indeed the counterclaim is so much in the nature of a set off and defence to the action that it would be unjust to grant the application of the plaintiff to sign final judgment against the defendant. As I have stated above, that was the view which I took at

the hearing of the application in chambers. Having heard all the further arguments in the matter I still feel that that is the correct view. I do not, therefore, propose to make any alteration in the order which I made in chambers.

Before concluding the matter I must refer to the final argument put forward by Mr. Shankar which was in relation to the inherent jurisdiction of the court. Mr. Shankar argued that the circumstances of this case are such that in the exercise of its inherent jurisdiction the court should make the order sought. I agree that this is a case in which the plaintiff has been compelled to satisfy a judgment against the partnership firm for a large sum, but in the absence of any proof that the counterclaim which the defendant has set up by way of a set off is frivolous and unsubstantial, it would be wrong for the court to grant the plaintiff any relief in the guise of the inherent jurisdiction of the court to the detriment of the defendant. The accounts of the partnership have not been finalized and it will be wrong for the court to make any order granting relief to the plaintiff at this stage of the proceedings.

Costs in the cause.

Order accordingly.

Solicitors: *Shearn Delamore & Co.*; *Shook Lin & Bok.*

MOHAMED BIN JAMAL v. PUBLIC PROSECUTOR

[F.C. (Thomson L.P., Tan Ah Tah F.J. & Chua J.) April 6, 1964]

[Singapore — Federal Court Criminal Appeal No. 18 of 1963]

Criminal Procedure — Appeal — Additional evidence — Principles on which Federal Court will act in exercising its discretion whether to allow fresh evidence to be called — Exceptional circumstance to justify admission of additional evidence.

Penal Code ss. 300 Exception 7, 302 & 304 — Murder — Diminished responsibility — Counsel's ignorance of existence of defence — Whether exceptional circumstance.

It is only in the most exceptional circumstances, and subject to exceptional conditions that the appellate court is ever willing to listen to additional evidence. These exceptional conditions are (i) the evidence that it is sought to call must be evidence which was not available at the trial; (ii) it must be evidence relevant to the issues; (iii) it must be evidence which is credible evidence in the sense that it is well capable of belief; (iv) the court will after considering that evidence go on to consider whether there might have been a reasonable doubt in the minds of the jury as to the guilt of the appellant if that evidence had been given together with the other evidence at the trial.

The ignorance of counsel who defended the appellant at the trial as to the very existence of one of the principal statutory defences available to a person charged with murder was a wholly exceptional circumstance which fell within the first of the exceptional conditions mentioned above and therefore leave to call additional evidence should be granted.

Observation duty of counsel where mental condition of the appellant (accused) invited some inquiry.

Cases referred to:—

(1) *R.* v. *Jordan* (1956), 40 Cr. App. 152, 154.

(2) *R.* v. *Parks* [1961] 3 All E.R. 633, 634; 1961 1 W.L.R. 1484.

FEDERAL COURT.

D. E. S. Chelliah for the appellant.

Tan Boon Teik (Solicitor-General) for the respondent.

Thomson L.P.: This appellant was convicted in the High Court in Singapore on 10th October, 1963, on three charges of murder in contravention of section 302 of the Penal Code. He applied for leave to appeal against these convictions and for leave to call additional evidence. On 26th February, 1964, we granted him leave to call certain evidence as to the state of his mind. We then proceeded to treat his application for leave to appeal as an appeal and heard the evidence of Dr. Yap Meow Foo. In the event we set aside the three convictions for murder and substituted for them convictions for culpable homicide not amounting to murder in contravention of section 304 of the Penal Code and imposed a sentence of life imprisonment in respect of each such conviction. We stated that we would give our reasons for the course we took at a later stage and we now proceed to do so.

The facts of the case were never in any real dispute. The appellant and one Chenchal Singh had been employed as watchmen on a building estate in Singapore, but the appellant had ceased to be so employed though he continued to live on the estate. The two men were not friends and on the evening of 5th April, 1963, they had some sort of quarrel over allegations that Chenchal Singh had damaged the appellant's boot and put sand in his rice bowl. Early the following morning the appellant went to the partially completed house where Chenchal Singh was living with his wife and family and killed Chenchal Singh, his wife Gurnam Kaur and his son Harban Singh. He did so by inflicting most terrible injuries upon them with a "parang". He disappeared but was arrested some eleven weeks later on another building estate where he had found employment.

The appellant was committed for trial on three charges of murder in contravention of section 302 of the Penal Code and after some preliminary objection by the defence Winslow J. held that the three charges should be tried together.

The trial commenced on 7th October, 1963. Eighteen witnesses gave evidence for the prosecution and the appellant gave evidence on his own